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No. 87-550

In The
Supreme Court of the United States
October Term, 1987

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO; ROBERT L. LEDERER, M.D.; JACK KLAPPER, M.D.; RAY PIPER, D.O.; FRED PACQUETTE, M.D.; CHRISTINE PETERSON, M.D.; JOHN CARROLL; STEPHEN KOZLOFF, M.D.; BRUCE WILSON; and MICHAEL VITEK, M.D.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred in affirming the granting of Summary Judgment by the District Court in favor of the respondents on the ground that the members of the Colorado State Board of Medical Examiners are absolutely immune from liability for suits brought under 42 U.S.C. § 1983?

2. Whether the Tenth Circuit Court of Appeals erred in affirming the granting of Summary Judgment by the District Court in favor of the respondents on the ground that the members of the Colorado State Board of Medical Examiners are qualifiedly immune from liability as a matter of law, if not absolutely immune from liability, for suits brought under 42 U.S.C. § 1983?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado and the opinion of the Tenth Circuit Court of Appeals in this case, have been reproduced and are attached to the Petition for Certiorari.

STATEMENT OF FACTS

From 1979 to 1983, 16 charges of unprofessional conduct were filed against Dr. Lenord D. Horwitz, D.P.M., with the State Board of Medical Examiners for the State

of Colorado. The Board is the State body empowered to license physicians and to take disciplinary action against them. Fifteen of these 16 charges were initiated by the Board. Prior to July 15, 1983, after two evidentiary hearings involving 14 of the charges, the Hearing Panel of the Board found that Dr. Horwitz had not violated any provision of the Podiatry Act, C.R.S. § 12-32-107, as amended. On July 15, 1983, Dr. Horwitz and the Board entered into a stipulation whereby the Board agreed to dismiss with prejudice the two remaining charges of unprofessional conduct against Dr. Horwitz in consideration of Dr. Horwitz agreeing to allow his surgical practice to be supervised by an ambulatory foot surgeon and his record keeping practice to be supervised by a podiatrist. Dr. Stephen Albert was appointed by the Board to serve as supervisor for both record keeping and surgery.

Dr. Albert submitted reports to the Board prior to December 1, 1983, indicating that certain records kept by Dr. Horwitz had been deficient, but that Dr. Horwitz had undertaken corrective measures. Prior to December 1, 1983, Dr. Albert had not submitted any negative reports relative to Dr. Horwitz' surgical practice.

On December 1, 1983, Dr. Albert and Dr. Horwitz met with the Inquiry Panel of the Board regarding why Dr. Albert had supervised only a limited number of Dr. Horwitz' surgical procedures. During the course of this meeting, but out of the presence of Dr. Horwitz, Dr. Albert expressed concern about the quality of Dr. Horwitz' surgical practice and stated his belief that Dr. Horwitz was a danger to the public. The Inquiry Panel thereafter met with Dr. Horwitz and his attorney regarding why the

number of surgical supervisions set forth in the stipulation had not occurred. No reference was made to Dr. Albert's complaints about Dr. Horwitz' surgical practice. Following Dr. Horwitz' departure from this meeting, the Inquiry Panel voted to summarily suspend Dr. Horwitz' license to practice podiatry in Colorado and instructed the Office of the Attorney General to prepare a formal complaint.

The Board's formal Order of Summary Suspension, dated December 21, 1983, was based both on oral and written reports submitted by Dr. Albert to the Board and contained the finding required under C.R.S. § 24-4-104(4) that the Board had reasonable grounds to believe that Dr. Horwitz' practice of podiatry constituted a threat to his present and future patients, and therefore to the public health, safety and welfare such as to imperatively require emergency action. See Appendix H to the Petition for Certiorari.

On January 4, 1984, Dr. Horwitz was served with the Order of Summary Suspension and formal complaint. Dr. Horwitz submitted his written response on January 5, 1984, the next day, but continued to practice podiatry until restrained from doing so by order of the District Court for the City and County of Denver on January 9, 1984. Within fifteen (15) days of Dr. Horwitz' written response to the Order and formal complaint and within ten (10) days of the issuance of the temporary restraining order, a full evidentiary hearing, beginning January 19, 1984, was held before a qualified hearing officer. Dr. Horwitz was represented by counsel and was afforded opportunity to present evidence, express his position and to fully cross-examine all witnesses.

On February 6, 1984, the Hearing Officer rendered his decision. See Appendix J to the Petition for Certiorari. He found in Dr. Horwitz' favor on 42 of the 44 allegations and found against him on two charges, which the Hearing Officer identified as relatively minor. The Hearing Officer recommended that Dr. Horwitz' license to practice podiatry be immediately reinstated, subject to his completion of the supervision previously agreed upon. Thereafter, both the Hearing Panel and the Inquiry Panel of the Board denied Dr. Horwitz' applications for reinstatement. On May 1, 1984, the Hearing Panel, following a review of the Hearing Transcript, entered its final order which in part affirmed the Hearing Officer's decision, in part modified the decision and in part included independent findings. See Appendix J to the Petition for Certiorari. The order placed Dr. Horwitz on one year probation and he remained subject to supervision. There were also certain additional requirements imposed.

On May 2, 1984, the day following the Board's Final Order, Dr. Horwitz filed an appeal with the Colorado Court of Appeals seeking State Court review of the agency action taken by the Board with respect to the summary suspension of his license. Before the Court of Appeals, Dr. Horwitz alleged the same facts as he has in this action and sought relief from the Board's orders on the theories of lack of jurisdiction, procedural defect, violation of the plaintiff's Fourteenth Amendment due process rights and violation of his statutory rights to due process.

On June 27, 1985, the Colorado Court of Appeals filed its opinion in the plaintiff's State case. See attached Appendix A. The Court addressed, and decided adversely to Dr. Horwitz, all of the plaintiff's jurisdictional, pro-

cedural, Constitutional and statutory due process arguments. A Petition for Certiorari to the Colorado Supreme Court was then filed by Dr. Horwitz. This Petition was denied. See attached Appendix B. Dr. Horwitz filed an appeal with the United States Supreme Court. This Court denied that appeal, and then, treating the appeal as a petition for Certiorari, denied that petition. See attached Appendix C.

Dr. Horwitz filed this action pursuant to 42 U.S.C. § 1983 and 1988 against the State Board of Medical Examiners as an entity and against its then current members. See Appendix G to the Petition for Certiorari. He sought compensatory and punitive damages, together with attorneys fees. Dr. Horwitz alleged that he had been subjected to unfounded complaints, was summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights, was defamed and subjected to outrageous conduct. The Board, as an entity, was dismissed from the suit by virtue of the State's claim of sovereign immunity under the Eleventh Amendment to the United States Constitution. That ruling has never been challenged.

The District Court granted Summary Judgment in favor of the individual members of the Colorado State Board of Medical Examiners, holding that they were absolutely immune from liability from 42 U.S.C. § 1983 damages suits under *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978). See Appendix A to Petition for Certiorari. In addition, the Court held that if the members of the Board were not entitled to absolute immunity, then they were at least entitled to qualified immu-

nity. The Court upheld the granting of summary judgment on this ground as well.

Dr. Horwitz then appealed to the Tenth Circuit Court of Appeals on the two immunity issues. The Tenth Circuit affirmed the District Court in all respects, also finding that the members of the Colorado State Board of Medical Examiners were absolutely immune from liability for suits pursuant to 42 U.S.C. § 1983 and, if they were not absolutely immune, they were also entitled to qualified immunity. See Appendix B to Petition for Certiorari. Dr. Horwitz then filed his petition for Writ of Certiorari with the United States Supreme Court.

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REASONS FOR DENYING PETITIONER'S WRIT OF CERTIORARI

A. THE TENTH CIRCUIT COURT OF APPEALS AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO CORRECTLY APPLIED THE LAW OF THIS COURT IN REACHING THEIR CONCLUSION, FINDING THE BOARD MEMBERS ABSOLUTELY AND QUALIFIEDLY IMMUNE FROM SUIT.

The Colorado State Board of Medical Examiners is a statutory body whose 11 members are appointed by the Governor. C.R.S. § 12-36-103(1). Its powers, duties and functions are set forth in the Colorado Medical Practices Act, C.R.S. § 12-36-101 *et seq.* (1973 as amended) and the Colorado Administrative Procedure Act, C.R.S. § 24-4-101, *et seq.* (1973 as amended).

Broad judicial and prosecutorial powers of the Board are set forth in C.R.S. § 12-36-104. Board procedures re-

quired for disciplinary proceedings are set forth in C.R.S. § 12-36-118. The Board consists of a president and ten members, two of whom are from the public at large and nine of whom are licensed physicians. The president of the Board divides the members into two panels for disciplinary action, with each panel consisting of at least four (4) physician members. Each panel serves as both an Inquiry Panel and a Hearing Panel. When a written complaint is received, the Inquiry Panel undertakes investigation into the charges in order to determine whether there are sufficient grounds for a hearing. All matters referred to one panel for investigation shall be heard, if referred for formal hearing by the other panel. The Board, in its discretion, may elect to refer a case for formal hearing to a qualified hearing officer for his initial decision. The initial decision, is subject to review by the Hearings Panel of the Board. The Board is empowered to investigate all complaints as well as initiate them. The statutory scheme provides for notice to the individual against whom a complaint is filed and an opportunity for such individual to respond. At all formal hearings, whether before the Hearings Panel or a qualified hearing officer, the complained against party may be present, with counsel, offer evidence and be heard in his own defense. Witnesses in the proceeding are sworn and a complete record, with testimony, is made. Ultimately, the Hearings Panel will determine whether the charges have been proven and, if such charges are proven, the panel determines what it deems to be appropriate relief. When the Hearings Panel submits its report or order with its findings and conclusion, it becomes the order of the Board.

C.R.S. 24-4-104(4) empowers the Board to summarily suspend an individuals license to practice medicine when

the Board has reasonable grounds to believe that the public health, safety or welfare is endangered and the Board finds that emergency action is required. In *Colorado State Board of Medical Examiners v. The District Court*, 191 Colo. 158, 551 P.2d 194 (1976), the Colorado Supreme Court upheld the statute against due process contentions similar to those advanced in this case. The Colorado Court of Appeals on review of the order of the Board entered in this case specifically upheld the Board's action in summarily suspending Dr. Horwitz' license to practice medicine under *Colorado State Board, supra.* Further, that Court found that the record did support the Board's determination that there were reasonable grounds to believe that emergency action was required.

1. The Members of the Colorado State Board of Medical Examiners Are Absolutely Immune from Suit.

This Court has followed a functional approach to immunity law. Absolute immunity flows not from rank or title or location within government, but rather from the nature of the responsibilities of the individual official. *Cleavinger v. Saxner*, 474 U.S. —, 88 L.Ed.2d 507, 514, 106 S.Ct. — (1985).

In *Butz v. Economou, supra,* the Court discussed this concept at length. In so doing, the Court found that agency officials who perform functions analogous to those of a court or prosecutor are entitled to the absolute immunity which traditionally has cloaked judges and prosecutors. In addition, the Court extended immunity to those agency officials who decide to initiate a prosecution, which was separate and distinct from the immunity afforded the

prosecutor who actually prosecuted a case for the agency. The rationale for this immunity was based upon the need for these officials to conduct their hearings and business free from the intimidating threat of reprisals from individuals against whom they might take action. The Court found that the safeguards inherent in administrative proceedings sufficiently protected the constitutional rights of parties thereby reducing the need for private damages actions. The Court made clear that its immunity rationale applied to claims against state officials under 42 U.S.C. § 1983, such as those present in this case.

The Inquiry Panel consistent with its statutory duties, is entitled to immunity for initiating proceedings against Dr. Horwitz. The Inquiry Panel heard the oral report of Dr. Albert and received his written report reflecting his concerns about the practice of Dr. Horwitz. By making the required statutory findings for invoking the summary suspension statute, the Inquiry Panel decided to initiate proceedings against Dr. Horwitz and instructed the Colorado State Attorney General's Office to do so on its behalf. Under *Butz v. Economou, supra,* they are entitled to absolute immunity for their decision to initiate this prosecution.

Similarly, the lower courts have correctly found that the Hearing Panel, and Inquiry Panel, were both entitled to judicial immunity. The Board reviewed the entire record produced in the evidentiary hearing and affirmed and modified the examiner's non-binding decision as well as making additional findings on their own. The Board then issued its final order disciplining Dr. Horwitz. These functions are completely compatible with and analogous

to the functions of a court entitling them to absolute immunity under *Butz v. Economou, supra.*

The immunity afforded the Board members is entirely necessary, as found by the lower courts, to allow the Board to carry out its statutory duties. This case represents a situation in which a person against whom agency action is initiated and prosecuted reacts by filing a threatening law suit. This is precisely the reason relied upon by the Court in *Butz, supra,* to support its granting of immunity to agency officials. Less than complete immunity for these individuals would deter qualified and competent professionals from serving on the Board, in any capacity, thereby increasing the dangers of individuals practicing medicine while constituting a threat to the health of their patients.

The lower courts in this case have correctly applied the law of absolute immunity in agency proceedings as that law is set forth in *Butz v. Economou, supra,* and their decision that the Board members are entitled to absolute immunity is entirely correct.

2. Members of the Colorado State Board of Medical Examiners Are Qualifiedly Immune from Suit.

Even assuming that the Board members are entitled only to the qualified immunity set forth in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the lower courts have both held that the Board members are entitled to such qualified immunity as a matter of law. The Board members have violated no clearly established constitutional or statutory rights of Dr. Horwitz. The Board is entitled to summarily suspend Dr.

Horwitz's license as long as he was provided a prompt post-deprivation hearing. *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

As both lower courts have found, Dr. Horwitz was provided with a prompt hearing after the summary suspension order issued, within fifteen (15) days of the Notice of Suspension to him and within ten (10) days of the date he stopped practicing podiatry. In fact, Dr. Horwitz filed his response on January 5, 1984, the day after he was notified of the suspension. As such Dr. Horwitz has not been unconstitutionally deprived of any right by the holding of a post-suspension hearing.

Nor can Dr. Horwitz complain of the hearing procedures themselves as being inadequate thereby depriving him of due process. He was given every opportunity to present his side of his story, first with his response filed on January 5, 1984 and second through the hearing which began on January 19, 1984. The hearing itself provided all of the features of an adversarial hearing before an impartial trier of fact. Dr. Horwitz was fully represented by counsel at the hearing and he had every opportunity to cross-examine witnesses. The entire record was reviewed by the Board prior to a final order issuing in May of 1984. This order issued within three months of the hearing officer's initial decision. Dr. Horwitz, as correctly found by the lower courts, has not been deprived of any constitutional due process rights.

Dr. Horwitz argues that there have been statutory violations by the Board as well. Dr. Horwitz simply argues that the Board should have acted under other statutory provisions that would have afforded him notice and

an opportunity to respond before his license was suspended. He chooses to ignore the fact that the Board acted pursuant to the emergency statute after the requisite finding was made that the Board had reasonable grounds to believe that Dr. Horwitz's practice of podiatry constituted a threat to his present and future patients, and therefore to the public health, safety and welfare such as to imperatively require emergency action. This statute, as indicated above, has previously been upheld as constitutional against similar due process attacks. As found by the lower courts, there has been no statutory violation by the Board. Therefore, the Board members are entitled to qualified immunity in that they have violated no clearly established constitutional or statutory rights of Dr. Horwitz.

Although Dr. Horwitz has continued to argue, albeit without authority, that the Board members are entitled only the qualified immunity set out in the statutory scheme, the lower courts have correctly rejected this contention. The Board members have claimed that they are entitled to common law immunity, outside of any conferred by statute, and the lower courts have correctly found this to be the case.

Dr. Horwitz has also argued that the Board members have failed to take oaths, citing Article XII, Section 8 of the Colorado Constitution. See Appendix K of the Petition for Certiorari. In *Hedstrom v. Motor Vehicle Division*, 662 P.2d 173 (Colo. 1983), the Colorado Supreme Court found that the oaths required by Article XII, § 8 applied only to those executive officers named in Article IV, § 1 of the Colorado Constitution, the Governor, Lieu-

tenant Governor, Secretary of State, State Treasurer and State Attorney General. Dr. Horwitz' argument that this section of the Colorado Constitution required oaths for the Board members, is specious and contrary to established state law in Colorado.

Moreover, there is substantial Colorado authority for the proposition that at all times the Board members were defacto officials duly authorized to carry out their responsibilities under law. *Butler v. Phillips,* 38 Colo. 378, 381, 88 P. 480 (1906). See *Andrade v. Lauer,* 729 F.2d 1475 (D.C. Cir. 1984).

CONCLUSION

At all times, the Board members were functionally comparable to a court of law. They decided to initiate the prosecution of Dr. Horwitz and then reviewed the case in its entirety before making a final decision. Moreover, Dr. Horwitz was provided with a prompt post-deprivation hearing which did not violate any of his clearly established constitutional or statutory rights. The lower courts' decisions finding the Board's members absolutely and qualifiedly immune from suit should be upheld in their entirety.

Respectfully submitted,

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EXHIBIT A

COLORADO COURT OF APPEALS

No. 84CA0541

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

COLORADO STATE BOARD OF MEDICAL EXAMINERS and THE PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General,

Respondents.

Review of Order from the Board of Medical Examiners of the State of Colorado

DIVISION I	ORDER AFFIRMED IN
Opinion BY CHIEF	PART, SET ASIDE IN
JUDGE ENOCH	PART, AND CAUSE
Pierce and Babcock, JJ.,	REMANDED WITH
concur	DIRECTION

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APPENDIX

IV

Petitioner, Lenord S. Horwitz, a podiatrist, appeals from an order of the State Board of Medical Examiners (Board) which placed his practice on one-year probation, subject to supervision and other requirements. We set aside in part and remand.

The Board is divided into two panels when conducting disciplinary proceedings. Section 12-36-118(1), C.R.S. (1984 Cum. Supp.). One panel is designated an "inquiry panel," the other a "hearings panel." Upon receipt of a written complaint, the inquiry panel investigates and determines whether there are sufficient grounds for a hearing. Section 12-36-118(4), C.R.S. (1984 Cum. Supp.). The hearings panel may then conduct an evidentiary hearing, or may appoint a hearing officer to conduct the hearing subject to its review. Section 12-36-118(1) and (5), C.R.S. (1984 Cum. Supp.). The hearing panel's report of its findings and conclusions, when approved and signed by a majority of the members of the panel who have conducted the hearing, becomes the action of the Board. Section 12-36-118(5)(g)(I), C.R.S. (1984 Cum. Supp.). When appropriate, the hearing panel is mandated to determine the extent of discipline within the statutory guidelines. Section 12-36-118(5)(g)(III), C.R.S. (1984 Cum. Supp.).

On July 15, 1983, petitioner and the Board entered into a stipulation which provided that two charges of unprofessional conduct which had been brought would be dismissed with prejudice in return for petitioner's agreement to complete 40 hours of continuing podiatric education in the area of surgery, to have his surgical practice super-

vised by an ambulatory foot surgeon, and to have his record-keeping supervised by a podiatrist. Dr. Albert, a podiatrist, was appointed to serve in both capacities.

On December 1, 1983, at a meeting with the inquiry panel to discuss scheduling difficulties, Dr. Albert was asked his opinion of petitioner's standard of care. He stated that in his opinion, because of poor technique and gross negligence, petitioner was a danger to the health, safety, and welfare of the public. After receiving these new charges, detailed in writing, the inquiry panel instructed the Attorney General to file a new complaint against petitioner, and on December 21, 1983, an order summarily suspending his license was entered.

A hearing was held before a hearing officer, and on February 6, 1984, the officer found two deviations from the standard of care: that X-rays were not available until surgery had virtually been started, and that a culture plate was left exposed to the air for one to three hours prior to incubation. Nevertheless, he recommended that petitioner's license be immediately reinstated, that no further discipline be imposed as a result of the charges, and that petitioner's supervision under the stipulation continue. Despite that recommendation, both the inquiry panel and the hearing panel denied petitioner's request to vacate the summary suspension.

Exceptions were filed to these findings, and after a hearing before the hearing panel it entered its final order on May 1, 1984. The panel affirmed the hearing officer's factual findings but found that the weight of the evidence supported an additional finding that the procedure used to sterilize swabs did not render them sterile, and,

thus, failed to meet generally accepted standards of care. It was ordered that he should be granted probation on the condition that supervision of his practice by podiatrists be continued, and that he commit no acts or omissions that constitute substandard medical care during the probationary period. Further, the suspension of his license was to be lifted as soon as he found Board approved supervisors.

On May 3, 1984, this court ordered the Board to locate and approve, by May 11, 1984, a podiatrist or podiatrists to supervise the petitioner's practice and to specify the terms and conditions of the probation. On May 10, the Board issued a supplemental order which appointed four podiatrists as observers, and stated probationary conditions that included the completion of courses in surgery, anesthetics, and aesptic technique. After this order was issued, petitioner demonstrated to this court that these podiatrists were unwilling to serve. On July 20, 1984, the Board amended its supplemental order to include the names of four new observers, only one of which was a podiatrist. Following this Board action, we granted petitioner's motion for stay pending this appeal.

I.

Petitioner first contends that the Board lacked jurisdiction to enter its orders because they were procedurally defective and violated his right to due process of law. He argues that the Board failed to follow the notice and hearing requirements of § 24-4-101 and §§ 12-32-101, et seq. C.R.S. (Colorado Podiatry Act), and §§ 12-36-101, et seq., C.R.S. (Colorado Medical Practices Act). We do not agree.

Colorado State Board of Medical Examiners v. District Court, 191 Colo. 158, 551 P.2d 194 (1976) specifically held that § 24-4-104(4), C.R.S., authorizes the Board to suspend summarily a license to practice medicine when it has reasonable grounds to believe that the public health, safety, or welfare is endangered, that emergency action is required, and the Board has incorporated such findings into its order. Furthermore, *Colorado State Board* rejected a due process argument similar to the one made by petitioner here.

The record supports the Board's determination that it had reasonable grounds to believe that emergency action was required. Although eventually most of the allegations were not proven, the Board was initially faced with the fact that 44 complaints had been lodged against petitioner by the Board-appointed supervisor. The Board's action was thus reasonably taken pursuant to its statutory authority under § 24-4-104(4), C.R.S., and that action is entitled to a presumption of validity and constitutionality which has not been overcome. *See Mitchell v. Charnes*, 656 P.2d 719 (Colo. App. 1982).

Petitioner has cited to the court the recent case of *Cleveland Board of Education v. Loudermill*, 470 U.S. —, 106 S.Ct. —, 84 L.Ed. 494 (1985), as support for his contention that § 24-4-104(4), C.R.S., violates his due process rights. Contrary to his contention, the Supreme Court in *Loudermill*, and the cases cited therein, continues to recognize that emergency action in certain cases, such as we have here, where the public welfare and safety may be affected, is not a violation of one's due process rights. The decision in *Loudermill*, *supra*, in our view does not affect the holding of *Colorado State Board*, *supra*.

Petitioner argues alternatively that even if the Board had the authority to suspend his license summarily, it failed to follow required procedures in so doing, and erred in not lifting the suspension after the hearing officer's initial findings. We disagree.

In *Colorado State Board, supra,* the Supreme Court rejected a similar argument that in cases of summary suspension statutory notice and hearing is required. In such cases the Board is required to provide the opportunity "for an ultimate judicial determination within a reasonably prompt time." *Colorado State Board, supra. See also Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed. 2d 365 (1979).

Here, petitioner concedes that the Board accorded him virtually an immediate hearing on the merits of the complaints. There is nothing in the record to indicate that the Board delayed its determination in any way, or that its final determinations were not reasonably prompt. *See Loudermill, supra.* Furthermore, because exceptions were filed to the hearing officer's initial findings, and because the findings explicitly stated that supervision of petitioner's practice should continue, and that the supervisor had resigned, it was not unreasonable, nor an abuse of discretion, for the Board to allow the suspension to continue.

II.

Petitioner next contends that the Board's orders are tainted with an unlawful appearance of unfairness by its consultation with the "Conflicts Counsel" from the Attorney General's office, and with an allegedly biased Podiatry Board. We find no merit in these contentions.

The Attorney General's office is required to serve both as the Board's counsel, and to prosecute charges before hearing panels and provide representation in support of Board decisions. To avoid the appearance of impropriety and to maintain the integrity of the administrative process, the regulatory law section and conflicts counsel has been separated within the attorney general's office. *Cf. Osborn v. District Court*, 619 P.2d 41 (Colo. 1980). Additionally a Board's actions are entitled to a legal presumption of regularity and validity, *Mitchell, supra*, which petitioner did nothing to overcome. Furthermore, petitioner concedes that there is no reason to believe that conflicts counsel participated in the deliberations of the Board.

Nor is there evidence that petitioner was prejudiced in any way by the Board's mandatory consultation with the Podiatry Board. *See* § 12-32-104, C.R.S. A fair hearing had already been accorded him prior to any consultation, *see McGee v. State Board of Accountancy*, 169 Colo. 87, 453 P.2d 800 (1969), and, unlike his prior hearing, petitioner presented no evidence to demonstrate that the Podiatry Board was still biased against him. Thus, petitioner failed to overcome the presumption of regularity.

III.

Petitioner also contends that the Board's orders are based on erroneous factual determinations, contrary to the weight of the evidence. We agree in part, but hold that any error is harmless.

The issue here concerns the Board's finding that petitioner did not properly sterilize swabs used in his practice, even though the hearing officer had found that the

evidence did not support the complaint on this matter. This decision by the Board was erroneous because the hearing officer's contrary finding of evidentiary fact was supported by competent evidence. *See* § 24-4-105(15)(b), C.R.S. (1982 Repl. Vol. 10); *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982).

The error is harmless, however, because the hearing officer found, and the Board affirmed, that petitioner had engaged in two deviations from the standard of care. Section 12-32-107(3)(i), C.R.S. (1984 Cum. Supp.) states that unprofessional conduct is defined as "two or more acts or omissions which fail to meet generally accepted standards of the practice of podiatry," and § 12-32-107(2), C.R.S., allows the Board to revoke or suspend the license to practice podiatry of one guilty of unprofessional conduct. Thus, an erroneous determination that the petitioner had participated in three acts which deviated from the standard of care, as opposed to two, does not affect the Board's ability to impose sanctions.

IV.

Petitioner next contends that there is no reasonable relationship between the conditions of probation imposed by the Board in its supplemental order and the unprofessional conduct which it found had been committed. We agree in part.

Section 12-36-118(5)(g)(III), C.R.S. (1984 Cum. Supp.) provides that when the Board finds charges have been proven it may order a podiatrist to continue to practice under probation, and may include in such order the probationary conditions it deems appropriate to assure

that petitioner practices in accordance with generally accepted professional standards. Here, it was established that petitioner had engaged in unprofessional conduct because of two deviations from the standard of care, § 12-32-107(3)(i), C.R.S., and it is thus not unreasonable for the Board to require continued observation. Section 12-36-118(5)(g)(III)(C), C.R.S., provides that one condition of probation may be "the review of supervision of his practice as may be necessary *to determine the quality of his practice* and to correct deficiencies therein." (emphasis added)

Although the Board has ordered the observation of areas of petitioner's practice which were not found substandard, the Board is empowered by its finding of unprofessional conduct to oversee petitioner's practice and determine the extent of such conduct. The Board has discretion in disciplinary matters, and we cannot say as a matter of law that it has abused its discretion here. *Cardamon v. State Board of Optometric Examiners,* 165 Colo. 520, 441 P.2d 25 (1968).

We agree, however, that the Board abused its discretion as a matter of law in requiring petitioner to complete courses in the area of surgery, anesthetics, and aseptic technique because there were no supportable findings from the hearing of substandard conduct in these areas. Section 12-36-118(5)(g)(III)(B), C.R.S. (1984 Cum. Supp.) states that as a probationary condition the Board may require one to take "such . . . course of training or education *as may be needed to correct deficiencies* as may be found . . . *in the hearing.*" (emphasis added) Hence, the language of this subsection requires that any courses in-

stituted as a probationary condition must be for the purpose of correcting a specific deficiency found in the hearing.

Here, the Board did make a finding at the hearing that petitioner's aseptic procedures were substandard because of the evidence concerning the improperly sterilized swabs. However, we have held in part III of this opinion that this finding was in error. Thus, there is no valid finding to support the order of the educational requirements in aseptic techniques and procedures.

It was also an abuse of discretion for the Board to have required petitioner to complete a course in anesthetics and surgery as a probationary condition, because there were no findings of deficiencies as a result of the hearing concerning these procedures. This holding, however, does not affect petitioner's obligation to complete 40 hours of continuing podiatric education in the area of surgery, which was part of the 1983 stipulation. The stipulation specifically states that any future Board findings do not stay its requirements.

V.

Petitioner contends that the Board's appointment in its amended supplemental order of observers who are not podiatrists is improper because the medical doctor and doctors of osteopathic medicine who will be observing and determining the quality of his practice will be unable to do so under the appropriate standard of care. We agree.

As previously stated, the Board is allowed to appoint observers to determine the quality of petitioner's practice to enable it to correct deficiencies therein. However, the

quality of a medical practice is determined according to the standard of care used by those in the same field. *Connelly v. Kortz,* 689 P.2d 728 (Colo. App. 1984). And, in general practitioners of one school of medicine are not competent to testify as to the standards of care of another. *Caro v. Bumpus,* 30 Colo. App. 144, 491 P.2d 606 (1971). Thus, the standard of care is the degree of skill that is customarily observed by practitioners of podiatry, and not the standards of practice or methods of practices of other schools of medicine. *See Caro v. Bumpus, supra.*

We thus hold that the Board abused its discretion when it appointed two osteopathic doctors and a medical doctor to serve as observers for the petitioner's practice.

VI.

Petitioner's contention that the failure of Board members to take an oath of office renders its proceedings null and void is without merit. *See Hedstrom v. Motor Vehicle Division,* 662 P.2d 173 (Colo. 1983).

Nor do we find that the Board's appointment of observers under its supplemental orders was the result of bad faith or was intended to harass or delay, and thus, we disagree with petitioner's contentions in this regard and deny his request for attorneys' fees. *See Mission Denver Co. v. Pierson,* 674 P.2d 363 (Colo. 1984); C.A.R. 38(d).

The Board's order which conditioned the petitioner's probation upon the completion of courses in anesthetics, aseptics, and surgery is set aside. However, as previously stated, this holding does not affect petitioner's obligation to take courses in surgery as specified in the original

stipulation of July 1983. In all other respects the order is affirmed. The cause is remanded to the Board for the limited purpose of appointment of observers who have been trained in the field of podiatry. Copies of the written order of appointment and acceptance by the observers shall be certified and forwarded immediately to this court. The court will then reconsider its stay order, which shall remain in effect until further order of courts. In the event the certified copies have not been filed with the court within 30 days of this opinion, the Board shall, in writing, advise the court of the status of the proceedings.

JUDGE PIERCE and JUDGE BABCOCK concur.

EXHIBIT B

SUPREME COURT, STATE OF COLORADO
Case No. 85SC492
Certiorari to the Colorado Court of Appeals 84CA0541
Appeal, State Board of Medical Examiners
RG ME DAAED

ORDER OF COURT

LENORD S. HORWITZ, D.P.M.,

Petitioner,

v.

COLORADO STATE BOARD OF MEDICAL EXAMINERS and THE PEOPLE OF THE STATE OF COLORADO, ex rel. DUANE WOODARD, Attorney General,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is DENIED.

BY THE COURT, EN BANC, MARCH 17, 1986.
CHIEF JUSTICE QUINN does not participate.

cc: Gary Sonke, Clerk
Colorado Court of Appeals
Hochstadt, Straw & Strauss, P.C.
Jordan Hochstadt
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State Board of Medical Examiners
c/o Thomas J. Beckett, Program Administrator
1525 Sherman Street, Room 130
Denver, CO 80203

(SEAL)

EXHIBIT C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 6, 1986

Mr. Thomas J. Lyons
Office of the Attorney General
1525 Sherman St., 2nd Floor
Denver, CO 80203

(Received October 9, 1986)

Re: Lenord S. Horwitz
v. State Board of Medical Examiners
of Colorado, et al.
No. 85-2046

Dear Mr. Lyons:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. Justice Scalia took no part in the consideration or decision of this case.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk